Petition

81-2078

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALAN D. AMON - GARY W. DUNBAR,
Petitioners,

v.

UNITED STATES OF AMERICA,

As reported in:

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. NO. 80-1856

ALAN D. AMON,
Defendant-Appellant,

and

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. NO. 80-1859

GARY W. DUNBAR,
Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Is trial court required to grant a motion to dismiss for selective prosecution when it finds "...defendant has been selected for prosecution because he is an active and outspoken (tax) protester"?

Is not review warranted when a three judge panel writes three opinions?

May the government cite wages earned in March through December, 1979 to prove alleged intent and knowledge in a W-4 filing on February 23, 1979?

PARTIES TO THIS PROCEEDING

The caption of this case, as presented, contains the names of all parties.

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The Petitioners pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered on June 15, 1981.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals Tenth Circuit is Slip Opinion No's: 80-1856 and 80-1859 (treated as companion cases) and is set out in Appendix A infra at P. A1. The Denial of Petition for Re-Hearing was entered March 9, 1982 and is set out at Appendix B infra at p. A 53.

JURISDICTION

The Judgment of the Tenth Circuit was entered on January 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1651(a).

STATEMENT OF THE CASE

The Petitioners here were defendants originally in the United States District Court for the District of Colorado. An appeal to the Court of Appeals for the Tenth Circuit treated them as companion cases, issuing one opinion, see infra Appendix A.

The United States District Court for the District of Colorado issued no opinion in either case, filing only prepared forms announcing findings and sentence, all of which are repeated in the opening paragraphs of Opinion of the Tenth Circuit (see Appendix A).

Both petitioners were convicted in separate non-jury trials of filing false withholding allowance certificates in violation of 26 U.S.C. §7205. Amon was convicted on each count of a two-count information charging him with violating

§7205. Dunbar was convicted on one count of a two-count information charging him with violating §7205. The appeals were consolidated because the issues raised in each were basically the same.

Both petitioners filed a Motion to Dismiss for Selective Prosecution. Each presented evidence that he was selected from among many on the same job site, plying the same trade and working for the same employer. Further, that only a selected few were being prosecuted, and that those individuals being prosecuted were selected because they had exercised their First Amendment right of free speech and the right to petition for redress of grievance. That they had been singled out as illegal tax protestors by the I.R.S. They were selected for prosecution by the Government because they were "outspoken". Following their trials, defendants renewed the motions.

After evidentiary hearings the district judge denied the motions.

Both Petitioners objected to the use of wages earned after the date on which they filed the W-4 form complained of. The government used those wages in proving the alleged "willful ... and knowing ... supplying [of] false and fraudulent information".

From convictions each carried his appeal to the United States Court of Appeals for the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

I

Petitioners were selected for prosecution because they exercised their rights under the First Amendment to the Constitution of the United States.

The Amendment reads in pertinent part:

> Congress shall make no law ... abridging the freedom of speech, ... or the right of the people

> peaceably to assemble, and to petition the Government for a redress of grievances.

When the trial judge denied petitioner's Motion to Dismiss for Selective Prosecution he said:

> "Accordingly, I am going to deny the motion to dismiss even though I find that the defendant has been selected for prosecution because he is an active and outspoken protestor"

Judge McKay continued at page 37 of his dissent:

> "... the court referred to Defendant's Exhibit D, a letter from the I.R.S. to a tax protestor in a situation similar to defendant's:
>
> 'Secondly, your return was selected for examination because of your past publicized activities in the illegal tax protest movement ...'
>
> The trial court also cited an I.R.S. Manual Supplement, Defendant's Exhibit G, which is captioned 'Examination and Investigation of Illegal Tax Protest-type Activities'. The instructions are replete with directions to proceed against 'protesters'. In its declaration of purpose, the document states, 'The procedures in this Supplement are not directed towards suppressing dissent or prosecuting individuals

> because they are critical of, or are identified with groups critical of, the tax system or government policies.' I.R.S. Manual Supplement, January 10, 1979, at 1. The overall tenor of the document, however, belies this statement of purpose. It makes clear that I.R.S. activities with regard to tax protesters extend well beyond the manifestly permissible policy of using admissions of a crime against the criminal, to the suspect policy of punishing political protesters --- or in other words, of punishing citizens for exercising a right which is front and center to the First Amendment ...
>
> Indeed, if the objective of the I.R.S. were only to prosecute the more serious or frequent violators of the tax laws, the word 'protester' would be irrelevant. As the trial court found, the object of the selectivity is to shut up the 'outspoken'."

And further, at page 3 of that dissent,

Judge McKay said:

> "... The net effects of the majority's handling of this issue are (1) a contradiction of the trial court's findings without any discussion of the insufficiency of the record to support them, and (2) the establishment of a rule which permits the government through selective prosecution to chill the exercise of a citizen's right to be 'outspoken' in protest against government policies."

The findings of the Trial Court met, point for point, the two-pronged test established by the decided cases of United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974). See also Oyler v. Boyles, 368 U.S. 448, 454-56 (1962); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

II

This Court should review when the Court below is seriously divided on a First Amendment right.

The three (3) judge panel felt compelled to write three (3) opinions in narrowly upholding incarceration when the admitted purpose of such incarceration is to silence an "outspoken" tax protester.

No right is more precious in our system of jurisprudence then the right to protest. When put in historical context, the protest against taxation speaks

to the oft-expressed beliefs of our revolutionary forefathers.

There should be clear and unequivocal evidence and findings to justify the jailing of a "tax-protester". Any hint of government action to silence and supress, for this reason, is that arbitrary action by Government which, under our Constitution, can and should be checked by this Court. Such review is mentioned in Rule 17.1(a) of this Court:

Rule 17

CONSIDERATIONS GOVERNING REVIEW OF CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has ... so far sanctioned such a departure (from the accepted and usual course of judicial proceedings) by a lower court, as to call for an exercise of this Court's power of supervision.

III

Wages earned after the critical date should not be used by government to prove intent and knowledge on that date.

In each count against each petitioner a specific date was cited on which the petitioner was charged with "willfully and knowingly" supplying "false and fraudulent information" to an employer.

The government was permitted, over objection, to introduce evidence of wages earned after that date in proof of the charges alleged.

This was plain error and prejudicial to petitioners.

CONCLUSION

The Motion to Dismiss for Selective Prosecution should have been granted when the lower court found selective prosecution for reasons clearly imper-

missible.

A result which causes each of the three judges on the panel to write separate opinions warrants review by this Court.

The trial court permitted "plain error" in proof of the government's case.

For the reasons set forth herein, the Petitioners respectfully pray that this Honorable Court will grant the Writ to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted:

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Tenth Circuit

Slip Opinion

P U B L I S H

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,	:	
Plaintiff-Appellee,	:	
v.	:	NO. 80-1856
ALAN D. AMON,	:	
Defendant-Appellant.	:	
and	:	
UNITED STATES OF AMERICA,	:	
Plaintiff-Appellee,	:	
v.	:	No. 80-1859
GARY W. DUNBAR,	:	
Defendant-Appellant.	:	

APPEALS FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
(D.C. NOS. 80-CR-44 & 80-CR-48)

Charles H. Torres, Assistant United States Attorney, Denver, Colorado (Joseph Dolan, United States Attorney, and John R. Barks-

dale, Assistant United States Attorney, Denver, Colorado, were with him on the Briefs) for Plaintiff-Appellee

Cecil A. Hartman, Attorney, Englewood, Colorado, for Defendants-Appellants

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Before HOLLOWAY, McKAY and LOGAN, Circuit Judges

HOLLOWAY, Circuit Judge

Both defendants were convicted in separate non-jury trials of filing false withholding allowance certificates in violation of 26 U.S.C. §7205.[1] Defendant-appellant Alan D. Amon appeals from his

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1

26 U.S.C. §7205 states in part that

> Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall . . . upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both.

conviction on each count of a two-count information charging him with violating §7205.[2] Defendant-appellant Gary W. Dunbar appeals from his conviction on one count of a two-count information charging him with violating §7205.[3] These direct appeals were consolidated because the issues raised in each are basically the same.

As grounds for reversal the defendants essentially argue that the trial court erred: (1) in refusing to dismiss the information due to premature filing

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2 Amon was sentenced to one (1) year of confinement on Count 1 of the information. Imposition of sentence was suspended as to Count 2 and the defendant placed on probation for two (2) years to begin when he was released from confinement under Count 1. (I R. 19).

3 Dunbar was sentenced to one (1) year of confinement on Count 2 of the information. (I R. 17).

by the Government; (2) in denying a motion to dismiss for lack of jurisdiction; (3) in refusing to dismiss the informations due to selective prosecution; (4) in admitting documents in evidence in violation of their constitutional rights under the Fourth and Fifth Amendments and their statutory rights under the Privacy Act; and (5) in admitting evidence concerning the amount of wages actually earned by them after they had filed their withholding allowance certificates. Defendant Dunbar also claims that the trial court erred in denying his motion for discovery.

I

Because neither defendant challenges the sufficiency of the evidence supporting their convictions, only a brief statement of the facts is necessary.

The evidence adduced at trial against

defendant Amon shows that on February 23, 1979, Amon submitted to his employer, Cherne Construction Company, an Employee's Withholding Allowance Certificate, form W-4, claiming an exemption from the withholding requirements and certifying that he incurred no liability for federal income tax for 1978 and that he expected to incur no federal tax liability for 1979. On June 15, 1979, Amon submitted another W-4 form to a different employer, Peabody Process Systems, again claiming an exemption from the withholding requirements and certifying that he incurred no federal tax liability for 1978 and that he did not expect to incur any tax liability for 1979. (II R. 16-20, 22-24, 27). There was expert testimony and other evidence tending to show that these claims were false. (II R. 26-33).

The record shows that on February 22, 1979, Amon signed and filed his 1978

income tax return which indicated a tax liability of $1,621.00 for 1978. Thus at the time he submitted both W-4 forms to his employers it could be inferred that he knew that he had incurred federal tax liability for 1978 and that he was not entitled to an exemption from the withholding requirements. Moreover, when he filed his second W-4 form in June 1979 it could be inferred that he knew that he had already been working for almost six months in 1979 and thus could reasonably anticipate a tax liability for that year. (II R. 28, 32-33, 50). The evidence was sufficient to support the inference that Amon knowingly, voluntarily, and intentionally supplied his employers with the false information contained in the W-4 forms, beyond a reasonable doubt. (II R. 10-11, 42-44, 47-48).

The evidence relating to defendant Dunbar shows that in February 1979 Dunbar

signed and filed his 1978 federal income tax return which indicated that approximately $3,902 had been withheld from his wages for taxes and that his federal income tax liability for 1978 was $3,611. (II R.44, 55-56, 62-65). The evidence further shows that in January 1979 Dunbar submitted to his employer, Ebasco Services, a W-4 form claiming an exemption from the withholding requirements. In July 1979 Dunbar and other Ebasco employees who were claiming an exemption from the withholding requirements received a form letter from the Internal Revenue Service (IRS) which outlined the legal requirements for claiming such an exemption. After a short lay-off in the summer of 1979 Dunbar was rehired by Ebasco in August 1979. At that time he filed another W-4 form with Ebasco, claiming an exemption from the withholding requirements and certifying that he incurred no

federal tax liability for 1978 and anticipated no tax liability for 1979. (II R.I5, 21-24, 46, 64-68). It was this latter W-4 filing for which Dunbar was convicted.

There was expert testimony and other evidence tending to show that the statements in the latter W-4 form submitted by Dunbar to his employer in August 1979 were false. (II R.44, 46-48). Moreover the evidence was sufficient to support the inference that Dunbar knowingly, voluntarily, and intentionally supplied his employer with false information, knowing that he had incurred a federal tax liability for 1978, beyond a reasonable doubt. (II R.65-68).

II

After criminal charges were filed against them, each defendant submitted to the IRS refund claims for all taxes

paid by them in 1978 and 1979.[4] Both defendants filed pro se pretrial motions arguing that the criminal charges should be dismissed because they were entitled to have their civil refund claims properly adjudicated before the Government could validly charge and prove criminal activity on their part. The district court's denial of these motions is challenged by both defendants in these appeals.

The refund claims were submitted after the criminal charges were filed and long after the acts of the defendants

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4 The separate informations charging Amon and Dunbar were filed by the Government on February 20, 1980. Amon's refund claims were received by the IRS on March 31, 1980. (II R. 6, 45-46). There was testimony that Dunbar's refund claims were never received by the IRS, but he testified at trial that he mailed them on April 12, 1980. (II R.41,71).

which form the basis of the criminal charges against them. Resolution of any civil claim for a refund of taxes already paid is clearly collateral, and not essential to the disposition of the criminal charges. See United States v. Peister, 631 F.2d 658, 664-65 (10th Cir.); see also United States v. Hinderman, 625 F.2d 994, 995 (10th Cir.) (per curiam). The criminal charges are primarily concerned with whether the defendants willfully supplied information on W-4 forms that they knew at the time was false. United States v. Peister, supra. We hold that the Government did not need to resolve the pending refund matters before pursuing criminal charges against the defendants.

III

Defendants argue that the district court, "under the rules of criminal proce-

dure, has no jurisdiction over matters arising under the Internal Revenue Code." The argument is mainly premised on assertions that the Internal Revenue Code is unintelligible and that it was not shown that defendants intended to or did harm society. (Brief of Appellant Amon at 4; Brief of Appellant Dunbar at 5). The argument is frivolous and without merit. See 18 U.S.C. §3231; United States v. Callow, Nos. 79-2197 & 80-1068, slip op. at 3-4 (10th Cir. May 22, 1980, unpublished). United States v. Brown, 600 F.2d 248, 259 (10th Cir.), cert. denied, 444 U.S. 917.

IV

Prior to trial both defendants moved to dismiss the criminal charges pending against them on the grounds that the Government's prosecution of them was unconstitutionally selective. These

motions were denied by the district court. Following their trials, defendants renewed the motions. After evidentiary hearings the district judge denied the motions.

On appeal, both defendants claim that the trial court erred by failing to dismiss the informations due to selective prosecution. More specifically they argue that the evidence is clear that many people continue to file for exemptions from the withholding requirement even though they are not legally entitled to claim them, that only a selected few are being prosecuted, and that those individuals being prosecuted are selected because they have exercised their First Amendment right of free speech or have been singled-out as illegal tax protestors by the IRS. With respect to their own cases, they claim that they were selected for prosecution by the Government because they were

"outspoken." (Brief of Appellant Amon at 5-7; Brief of Appellant Dunbar at 7-9).

It is fundamental that "[s]electivity in the enforcement of criminal laws is . . . subject to constitutional constraints." United States v. Batchelder, 442 U.S. 114, 125. Nevertheless, "'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" Bordenkircher v. Hayes, 434 U.S. 357, 364, quoting Oyler v. Boles, 368 U.S. 448, 456. "Moreover, there is a presumption that prosecution for violation of the criminal law is in good faith," United States v. Bennett, 539 F.2d 45, 54 (10th Cir.), cert. denied, 429 U.S. 925; accord, Barton v. Malley, 626 F.2d 151, 155 (10th Cir.). Here the district judges, after eviden-

tiary hearings in both cases, found that no unconstitutionally selective prosecution of the defendants had occurred. We are satisfied that the findings are supported by the record and are not clearly erroneous and thus should not be set aside.[5] See United States v. Ganter, 436 F.2d 364, 368 (7th Cir.).

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5 The evidence presented at both evidentiary hearings was similar. Defendant Dunbar testified that he filed for an exemption from the withholding requirement as a form of protest against the way the Government was being operated and that he discussed his views with other employees. (I Supp. R. 8-9). Referring to the Government's support of a foreign war, Dunbar said that his refusal was "not just not to pay a tax. It is to tell them that what they do with our money was wrong." (Id. at 9).

Defendant Amon testified that he was very outspoken in his views concerning the tax collection system and noncompliance with tax laws. (II Supp. R. 5-6, 9). Further evidence was presented at both evidentiary hearings tending to show that the IRS has a formal policy of prosecuting individuals who are outspoken in their criticism of federal income tax laws.

In both cases there are particular findings in the district judges' rulings which we should discuss. At the conclusion of Amon's evidentiary hearing, the judge specifically found that the selection of Amon for prosecution "was in compliance with the directives and the policies" of the IRS, that he saw no "pattern or practice of attempting to silence Mr. Amon on any given occasion where he chooses to exercise his First Amendment rights by the institution of investigation, arrest or prosecution", but that Amon was "selected for prosecution because he is an active and outspoken protestor." (II Supp. R.30-32). After enunciating the proper two-prong test for establishing an unconstitutionally selective prosecution,[6] the district court

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[6] Relying on United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir.), the district court held

(Footnote continued on next page)

concluded that it was unable to determine if Amon had been "singled out" for prosecution since the statute of limitations had not yet run for others who were similarly situated.[7] Citing United States v.

(Footnote continued from preceding page)

that Amon had the burden of proving (1) that he had been singled out for prosecution while others similarly situated had not generally been proceeded against for the type of conduct forming the basis of the charge against him and (2) that the Government's discriminatory selection of him for prosecution has been invidious or in bad faith and has been based on impermissible considerations such as race, religion or the desire to prevent the exercise of constitutional rights. (II Supp. R. 29, 31-32). This test has been recognized in our prior decisions. See, e.g., Barton v. Malley, supra, 626 F.2d at 155.

7 There was testimony by Amon and stipulated exhibits showing a substantial number of other "exempt" filings where Amon had worked, and he testified that he knew of no other prosecutions in those groups. (II Supp. R.7-9; Def. Exhs. A and B). The Government developed the fact that similar prosecutions had occurred in the case of Dunbar and one Lyle Bert. (II Supp. R.10-11). In the Amon record it was not established where Dunbar and Bert were employed or prosecuted.

Stout, 601 F.2d 325 (7th Cir.), the district court did hold, however, that "the defendant's status as an active protestor was insufficient to establish selective prosecution," and that no "invidious" discrimination occurs when, as here, the IRS prosecutes individuals "for actions which they take in failing to comply with the tax laws where the transgential [sic] [tangential] effect is to dissuade others from engaging in that kind of tax protest." The court concluded that (II Supp. R.32):

> Accordingly, I am going to deny the motion to dismiss even though I find that the defendant has been selected for prosecution because he is an active and outspoken protestor. That will present the issue of law squarely, but I do think that United States vs Stout is the existing law on the subject.

We agree with the trial court's ruling. Defendant Amon's asserted claim of a First Amendment infringement is not sufficient. Merely showing that the Government elected, under established IRS directives, to

prosecute an individual because he was vocal in opposing voluntary compliance with the federal income tax law, without also establishing that others similarly situated were not prosecuted and that the prosecution was based on racial, religious or other impermissible considerations, does not demonstrate an unconstitutionally selective prosecution. See United States v. Rickman, 638 F.2d 182, 183 (10th Cir.); United States v. Stout, 601 F.2d 325, 328 (7th Cir.), cert. denied, 444 U.S. 979; United States v. Catlett, 584 F.2d 864, 866-867 (8th Cir.); United States v. Johnson, supra, 577 F.2d at 1309. We uphold the trial court's ruling on the ground that the defendant Amon did not satisfy the second requirement--that the prosecution was based on racial, religious or other impermissible

considerations.[7a]

In the Dunbar case the district judge reached a similar conclusion without making all the findings stated in the Amon case.[8] The judge said that it would be

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[7a] See note 6, supra. We express no opinion on the reasoning of the trial court noted earlier that the judge was unable to determine if Amon had been singled out for prosecution because the statute of limitations had not yet run for others who were similarly situated. This presents a question which we need not reach in the Amon or Dunbar cases.

[8] In passing on the correctness of the trial court's conclusion that an unconstitutionally selective prosecution of the defendant did not occur, this court may consider any evidence properly presented at trial, even though that evidence might not have been introduced at the post-trial evidentiary hearing. Cf. United States v. Smith, 527 F.2d 692, 694 (10th Cir.). Hence, we are noting here some other matters brought out at trial which have some pertinence to the selective prosecution issue.

As the district court noted at trial, there was undisputed testimony from Dunbar's employer that a third of its employees, approximately 400 persons, were claiming an exemption from the withholding requirements. (II R. 18, 31, 81; I Supp. R. 6-7). Additionally Dunbar

(Footnote continued on next page)

anomalous if an individual were immunized from prosecution merely because his protest is against the very law which he is violating or because the Government has not prosecuted everyone who has violated the same law. (I Supp. R.16-17). We must agree again that the showing made

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(Footnote continued from preceding page)

testified that "everybody" in his craft was filing for exempt status. (II R. 63). The district court found this evidence sufficient to establish a reasonable doubt as to whether Dunbar "acted in knowing and willful violation of a known legal duty" with respect to the W-4 form he submitted to his employer in January, 1979. (II R. 81).

As noted in Part I, supra, the Ebasco employees who were claiming exemptions from the withholding requirement received a letter from the IRS outlining the legal prerequisites for properly claiming an exemption. The trial testimony of Ebasco's representative indicates that after receiving this letter "quite a few people" resubmitted W-4 forms and dropped their claims for exemptions. (II R. 21). The evidence presented at trial clearly shows that after receiving the IRS letter Dunbar continued to claim an exemption from the withholding requirements. Dunbar stated at trial that he personally knew only one other person from his craft, one Lyle Bert, who was being prosecuted. (II R. 63).

did not establish an unconstitutionally selective prosecution. See United States v. Rickman, supra, 638 F.2d at 183.

In sum, in neither case can we agree that an unconstitutionally selective prosecution was demonstrated.

V

The defendants argue that the district court commi~ted "gross error" by permitting the Government to introduce in evidence certain documents which were required by law to be filed by the defendants with their employers and the Government.[9] They claim that the Government's use of these documents to prove the case against them violated their constitutional

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[9] These documents were identified at argument as being the various W-4 and federal income tax forms in evidence.

rights under the Fourth and Fifth Amendments and their statutory rights under the Privacy Act, 5 U.S.C. §552a, because the documents contained no Miranda warnings and no warnings required under the Privacy Act which would indicate that the documents could be used against them in a criminal case. (Brief of Appellant Amon at 8; Brief of Appellant Dunbar at 9-10).

Initially we note that the defendants failed to object at trial to the admission of these documents on the grounds now asserted.[10] Ordinarily where an objection

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[10] At oral argument counsel for the defendants-appellants stated that the district court did not permit him to make a specific objection to the documents being offered by the Government. At argument Government counsel did refer to testimony concerning the Privacy Act having been given at trial. After reviewing the record in both cases, we must disagree with the contentions that a specific objection was prevented by the trial judge and that the substance of the objection was made. Defense counsel was provided ample opportunity to raise an objection to the Government's use of the documents now challenged. (II R. 28,39,54 (Dunbar); II R. 8-9, 18-19, 23-24 (Amon)).

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to the admission of evidence is not made at trial the issue may not be raised on substantial rights of the defendant. See, e.g., United States v. Popejoy, 578 F.2d 1346, 1350 (10th Cir.), cert. denied, 439 U.S. 896; United States v. Stevens, 452 F.2d 633, 635 (10th Cir.).

In any event Miranda warnings are not constitutionally required where, as here, the information requested by the Government on the tax forms is not obtained from the defendants in a custodial setting. See, e.g., Beckwith v. United States, 425 U.S. 341, 345-47; United States v. Brown, supra, 600 F.2d at 252 & n.3.

(Footnote continued from preceding page)

Only during Amon's trial did defense counsel object to the government's use of these documents. The objection, however, did not relate to the constitutional and Privacy Act claims now asserted, but instead related to the contention discussed in Part VI, infra, of this opinion.

It is also clear that defendants' Fourth Amendment rights have not been violated by the Government since they could not legitimately claim an expectation of privacy in documents which they submitted voluntarily to the IRS and their employers. See Couch v. United States, 409 U.S. 322, 335-36; Katz v. United States, 389 U.S. 347. Moreover, as to the W-4's there was no violation of defendants' rights under the Privacy Act of 1974, 5 U.S.C. §552a, since the instructions accompanying the forms submitted by the defendants contain the necessary admonition.[11] See United States v. Rickman, supra, 638 F.2d at 183.

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[11] Amon admitted at trial that he had read the Privacy Act notice concerning the W-4 forms. (II R. 37-38, 41-42). Dunbar admitted receiving a letter from IRS, and the letter was accompanies by the W-4 instruction form with the Privacy Act notice. (Pl. Ex. 3; II R. 65-66).

There is no record evidence to indicate whether information forms relating to the tax returns or other documents containing a Privacy Act notice were received by defendants, but the objection is nevertheless unavailable since it was not made at trial, as noted above.

VI

Defendants' final contention concerns the admission in evidence of testimony and documents relating to the total amount of wages earned by them during the 1979 tax year. Specifically they argue that evidence concerning the amount of wages earned after they submitted their W-4 forms to their employers is irrelevant to a determination of whether they knew at the time they submitted the forms that they would have a tax liability for 1979. (Brief of Appellant Amon at 8-9; Brief of Appellant Dunbar at 10).

There was expert testimony indicating that an individual must be able to certify that he had no tax liability for the previous tax year and that he anticipated no tax liability for the current year in order to be entitled to claim the exemption. Evidence concerning the amount of wages earned after the submission of the W-4 form to the employer is clearly relevant within the meaning of Rule 401, Fed. R.Evid., since it tends to establish a motive for falsely claiming an exemption from the withholding requirements. Moreover, such evidence tends to rebut the taxpayer's claim that he could not reasonably anticipate tax liability for the current year. Consequently the trial court did not err in admitting such evidence.

Even assuming, however, that the trial court erred in admitting the evidence, we think that it would be harmless

error within the meaning of Rule 52, Fed.R.Crim.P. Here there was sufficient evidence in the record, as we noted in Part I, supra, showing that each defendant incurred a tax liability for 1978 thereby precluding any legal claim for an exemption from the withholding requirements. Accordingly this evidentiary contention lacks any logical force.

VII

We have examined the remaining appellate contentions of the defendants and find that they are without merit and require no further discussion. We are satisfied that no reversible error is demonstrated and the judgments are

A F F I R M E D.

Nos. 80-1856 and 80-1859 -

UNITED STATES OF AMERICA v. ALAN D. AMON and GARY W. DUNBAR

Logan, Circuit Judge, concurring:

The remarks of Judge McKay in dissent impel me to comment upon my support of that part of the majority opinion rejecting the selective prosecution argument of the defendants. Focusing on the trial court's finding that Amon was "selected for prosecution because he is an active and outspoken protestor," Judge McKay apparently discredits the court's ultimate finding that the IRS evidenced "no pattern or practice of attempting to silence Mr. Amon on any given occasion where he [chose] to exercise his First Amendment rights by the institution of investigation, arrest or prosecution"; he concludes, contrary to the trial court's express determination, that the

IRS selectively prosecuted Amon in order to shut him up. Adhering to the clearly erroneous standard, I am unwilling to discount the trial court's findings of fact.

I agree that citizens must be permitted to speak out against laws they regard as unjust or undesirable. If one merely called for disobedience of the tax laws, there being no crime in merely urging disobedience, I would apply the clear and present danger test, and in all probability hold that the threat of substantial and serious danger to organized government is not sufficient to warrant suppression of free speech. See Herndon v. Lowry, 301 U.S. 242 (1936). But this is not such a case. These tax protestors and others like them are individuals who not only urge change in our tax laws and disobedience, but also state clearly and publicly that they have

violated the law by refusing to file tax returns, filing essentially blank tax returns, or claiming unlawful exemptions from taxes. As part of this admission they urge others to follow their example. Thus, they become public symbols of opposition to the law and admitted lawbreakers who, under Judge McKay's view, could not be prosecuted unless all who similarly break the law are prosecuted, or, if prosecutorial resources are insufficient, are selected for prosecution by a random or neutral process.

This precise situation apparently has not been before the Supreme Court, although the Court has upheld the constitutionality of a law punishing one who encourages commission of a crime. Fox v. Washington, 236 U.S. 273 (1915). The Supreme Court has also indicated that advocacy of violations of the law may be prohibited when "such advocacy is directed

to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

The Eighth Circuit has considered and rejected exactly the selective prosecution argument asserted here, apparently involving the same IRS manual. In doing so it declared,

> "While the decision to prosecute an individual cannot be made in retaliation for his exercise of his first amendment right to protest government war and tax policies, the prosecution of those protestors who publicly and with attendant publicity assert an alleged personal privilege not to pay taxes as part of their protest is not selection on an impermissible basis.
>
> ". . . We noted [in United States v. Ojala, 544 F.2d 940 (8th Cir. 1976)], that selection for prosecution based in part upon the potential deterrent effect on others serves a legitimate interest in promoting more general compliance with the tax laws. Since the government lacks the means to investigate and prosecute every suspected violation of the tax laws, it makes good sense to prosecute those who will receive, or are likely to receive, the attention of the media."

United States v. Catlett, 584 F.2d 864, 867-68 (8th Cir. 1978). In United States v. Moss, 604 F.2d 569 (8th Cir. 1979), cert. denied, 444 U.S. 1071 (1980), that circuit stated,

> "Freeman alleges that his speeches '[challenge] the constitutionality of the income tax laws as . . . enforced in this country . . .,' that he 'espouses a political cause aimed at changing the tax law in the United States . . .,' and that his actions were 'absolutely protected' by the first amendment, any conviction founded on the present record being 'outside the . . . perview of . . . the laws of this country.'
>
> "Freeman's objection was answered by this court in United States v. Buttorff, 572 F.2d 619 (8th Cir. 1978), on facts similar to those here, 572 F.2d at 623-24: '[T]he Supreme Court has distinguished between speech which incites imminent lawless activity. See Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed. 2d 430 (1969). The former is protected; the latter is not.
>
> "Although the speeches here do not incite the type of imminent lawless activity referred to in criminal syndication cases, the defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches

> and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue. This speech is not entitled to first amendment protection and, as discussed above, was sufficient action to constitute aiding and abetting the filing of false or fraudulent withholding forms.'"

604 F.2d at 571.

A fifth Circuit case, United States v. Johnson, 577 F.2d 1304 (5th Cir. 1978), considered the selective prosecution argument in tax protestor cases in considerable detail. On the key point urged before us, it declared,

> "'[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.' Oyler v. Boles, supra, 368 U.S. at 456, 82 S.Ct. at 506. See also Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497 (1944). Selection, moreover, is not impermissible solely because it focuses upon those most vocal in their opposition to the law which they are accused of violating. The fact that tax protestors are vigorously prosecuted for violation of the tax laws demonstrates nothing more than a legitimate interest in

> punishing flagrant violators and deterring violations by others."

577 F.2d at 1309.

The Seventh Circuit has also spoken on this issue.

> "It is not improper for the Government to concentrate on those violations which appear most flagrant. United States v. Stout, 601 F.2d 325, 328 (7th Cir. 1979). As this Court recently stated in that case: 'Aggressively displaying one's antipathy to the * * * system or daring the government to enforce it does not create immunity from, or a defense to, prosecution.'"

United States v. Heilman, 614 F.2d 1133, 1139 (7th Cir.), cert. denied, 100 S.Ct. 3014 (1980). Also,

> "[a]ssuming that the decision to indict Peskin and press for trial was based in part on consideration of his political prominence, this is not an impermissible basis for selection. It makes good sense to prosecute those who will receive the media's attention. Publication of the proceedings may enhance the deterrent effect of the prosecution and maintain public faith in the precept that public officials are not above the law."

United States v. Peskin, 527 F.2d 71, 86

(7th Cir. 1975), cert. denied, 429 U.S. 818 (1976).

Our own circuit has previously set forth the same principles in reviewing a case involving violations of a zoning ordinance.

> "Mere failure to prosecute other offenders is no basis for a finding of denial of equal protection. '[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.' Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962). Selective enforcement without malicious intent may be justified when a test case is needed to clarify a doubtful law, Mackay Telegraph Co. v. Little Rock, 250 U.S. 94, 100, 39 S.Ct. 428, 63 L.Ed. 863 (1919), or when officials seek to prosecute a particularly egregious violation and thereby deter other violators. People v. Utica Daw's Drug Co., 16 A.D.2d 12, 225 N.Y.S.2d 128, 4 A.L.R.3d 393 (1962). Appellee informs us that many of the other violators called as witnesses by appellant have ceased their illegal practices as a result of the experience."

Cook v. City of Price, 566 F.2d 699, 701 (10th Cir. 1977). See United States v.

Rickman, 638 F.2d 182 (10th Cir. 1980) (tax protestor case).

I am in agreement with the expressions in the quotations I have set out. I think Judge Holloway's opinion handles the selective prosecution issue at least as favorably toward defendants as they are entitled, and I agree with his handling of the other issues in the appeal. I therefore join in that opinion.

Nos. 80-1856 - UNITED STATES OF AMERICA
v. ALAN D. AMON
80-1859 - UNITED STATES OF AMERICA
v. GARY W. DUNBAR

McKAY, Circuit Judge, dissenting:

Based on an adequate record, the trial court held:

> Accordingly, I am going to deny the motion to dismiss even though I find that the defendant has been selected for prosecution because he is an active and outspoken protestor.

Supp. Record, vol. 2, at 32 (emphasis added). In reaching this conclusion, the court referred to Defendant's Exhibit D, a letter from the IRS to a tax protestor in a situation similar to defendant's:

> Secondly, your return was selected for examination because of your past publicized activities in the illegal tax protest movement ....

The court also cited an IRS Manual Supplement, Defendant's Exhibit G, which is captioned "Examination and Investigation of Illegal Tax Protest-type Activities." The instructions are replete with directions to proceed against "protestors."

In its declaration of purpose, the document states, "The procedures in this Supplement are not directed towards suppressing dissent or prosecuting individuals because they are critical of, or are identified with groups critical of, the tax system or government policies." IRS Manual Supplement, January 10, 1979, at 1. The overall tenor of the document, however, belies this statement of purpose. It makes clear that IRS activities with regard to tax protesters extend well beyond the manifestly permissible policy of using admissions of a crime against the criminal, to the suspect policy of punishing political protesters -- or in other words, of punishing citizens for exercising a right which is front and center to the first amendment. Indeed, if the objective of the IRS were only to prosecute the more serious or frequent violators of the tax laws, the word

"protester" would be irrelevant. As the trial court found, the object of the selectivity is to shut up the "outspoken."

The test for determining whether a prosecution is unconstitutionally selective is two-pronged. To support a selective prosecution claim a defendant bears a heavy burden of establishing, at least prima facie (1) that he has been singled out for prosecution, and (2) that the selectivity for prosecution was invidious or in bad faith, that is, based on such impermissible considerations as race, religion, or the desire to prevent or inhibit his exercise of such constitutional rights as free speech. United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974). See also Oyler v. Boyles, 368 U.S. 448, 454-56 (1962); Yick Wo v. Hopkins, 118 U.S. 356 (1886). In other words, challengers must show both

selectivity and proscribed motivation.

A reading of the trial court's findings in context makes clear that the trial court was struggling wiht the implementation of this test. It has not been easy for this court to give substance to the broad statement of the rules regarding selective prosecution. While it may be that in context the trial court was merely saying that defendant was in fact not singled out for prosecution, the trial court undeniably found that if defendant was singled out the motivation was that "he is an active and outspoken protestor." The majority opinion is simply mistaken in concluding that the trial court ruled that the defendant had not satisfied the second leg of the test -- i.e., had not shown that the prosecution was motivated by the desire to inhi-

bit his exercise of free speech.[1] The trial court's express finding is exactly to the contrary -- "I find that the defendant has been selected for prosecution because he is an active and outspoken protestor." Supp. Record, vol. 2, at 32 (emphasis added). In fact, a close reading of the trial court's struggle with the issues indicates that its doubt arose not from the IRS's motivation but rather from an erroneous belief that it was necessary for the defendant not only to show that he was the only one so far who had been prosecuted but also that the statute of limitations had run as to all

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[1] The principal difference between Judge Logan and me is not that we emphasize different trial court findings, but that he would affirm a criminal conviction based on conflicting findings by the trial court on the key issue. I would not. The trial court should have an opportunity to clear up its findings under proper guidelines.

other persons similarly situated. That test for determining selectivity is not only erroneous but an impossible test for anyone to meet. The majority is not prepared to hold that that test should in fact be applied. The net effects of the majority's handling of this issue are (1) a contradiction of the trial court's findings without any discussion of the insufficiency of the record to support them, and (2) the establishment of a rule which permits the government through selective prosecution to chill the exercise of a citizen's right to be "outspoken" in protest against government policies.

The trial court's confusion apparently arises from a failure to understand what kinds of proof can show selective prosecution. The trial court apparently believed that the only way selectivity could be shown was by circumstantial

evidence -- i.e., that all other possible violators had been ignored while the defendant had been prosecuted. While that is one method of showing selectivity, it is certainly not the only method. Selectivity also may be shown by direct evidence, as apparently was done, and was accepted by the trial court as being done, in this case. That is, it may be shown by what has been colloquially called the "smoking pistol" method, an outright admission. Proof adduced in this case showed that the IRS had a deliberate policy of selecting and attempting to silence those who were "outspoken protesters" against the tax laws. If it were shown by direct evidence that such a policy had been applied to defendant -- and apparently the trial court found that it had -- then the first leg of the test is satisfied without requiring defendant to conduct his own

nationwide investigation of tax violations to identify all possible defendants and then to show that none of them had been prosecuted.

In the present case, the first and second legs of the test are satisfied by the same proof. Here, the IRS declared (and the trial court believed) that it intended to select and silence outspoken tax protesters. Thus, both the fact of selectivity and its motivation -- to silence the outspoken -- are proved by direct evidence. I find it impossible to believe that the majority really means what it is saying. Surely it does not mean that, even though the government declares its intent to select persons for prosecution in order to silence them, the ensuing prosecution does not violate constitutionally protected interests.

It is beyond cavil that this conviction would fall if the trial court had

found:

> This defendant has been selected for prosecution because he is black

Nor would there be any doubt if the trial court had found:

> This defendant has been selected for prosecution by the IRS because he is on the President's political enemies list.

Similarly, there can be no doubt that this conviction would fall if the trial court had found:

> This defendant has been selected for prosecution because he protested in writing that
>
> there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.

Commissioner v. Newman, 159 F.2d 848, 850-51 (2d Cir. 1947) (Judge Learned Hand, dissenting) (approved and quoted in Atlantic Coast Line v. Phillips, 332 U.S.

168, 173 (1947) (Frankfurter, J., delivering the opinion of the Court)).

Whatever else the trial court may have found, its express language compels the conclusion that it found that this defendant had been selected for prosecution because he was an "outspoken protester." To hold that such selectivity is permissible would make the examples of selectivity I have just set out equally permissible. For first amendment purposes, nothing distinguishes an "outspoken protester" against existing tax laws from one who protests as Judge Hand and Justice Frankfurter have protested.

By definition, each and every instance of selective prosecution which reaches us on appeal involves a person who has allegedly violated some law. Nevertheless, the usual carte blanche of the prosecutor in seeking the convictions of these persons is subject to the requirement that

that the decision to prosecute not be motivated by factors by which the government cannot constitutionally distinguish one violator from all others. If administratively the government has not the resources to prosecute every violator, if the government therefore must pick and choose from among all violators, it may not do so based on its desire to shut the taxpayer up. However reprehensible may be citizens who object to paying the taxes which make possible an acceptable degree of civilization, the first amendment protects the right to make those objections. If not, then the constitutional guarantee of free speech is illusory.[2] Where, as here, the govern-

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[2] The right to protest against government policies lies at the core of first amendment values, and the debate in this area of the law is whether commercial speech and recreational speech are entitled to the same constitutional protection as protest. See, e.g., Valentine v.

(Footnote continued on next page)

ment seeks to silence a citizen precisely because it detests or fears the citizen's spreading of ideas relating to effective self-government, the Constitution forbids the government action unless the annunciation of those ideas amounts to such a clear and present danger to the security of the Republic that it falls outside the ambit of otherwise protected political speech.

Footnote continued from preceding page)

Chrestensen, 316 U.S. 52 (1942) (Constitution imposes no restraints on government restrictions of purely commercial advertising); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (commercial speech is within protective ambit of the first amendment); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (line between the informing and the entertaining too elusive to be drawn, therefore as general rule "expression by means of motion pictures [must be] included within the free speech and free press guaranty of the First and Fourteenth Amendments."); Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1 (1979) (and cases and commentaries discussed therein).

While one could argue that the history of the American Revolution supports a finding that tax protests present a clear and present danger to the Republic, there is no argument before us that they do; no court has so held; and it is doubtful that any court is prepared so to hold. Of course there is a danger that illegal tax practices will become more widespread if the government fails to strike swiftly and decisively in gagging or at least intimidating the most outspoken tax protesters. However, in a day in which even a computerized search is incapable of tabulating the fractions of a citizen's conduct which government agents now have discretion to charge severally or cumulatively as alleged violations of the law, the necessity of subjecting that discretion to constitutional scrutiny is manifest and certain. It seems a puny enough effort to suggest

that the limit on the dangers of unconstitutional discrimination be drawn at least where the hapless citizen can carry his heavy burden to show that he was singled out because (to use the trial court's express language) "he is an active and outspoken protestor."

It is hard to imagine a kind of political protest more consistent with the most cherished traditions of this nation than protest focusing on the laws of taxation. Certainly no form of protest is more American.[3] It was, after all,

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[3] Furthermore, tax protest is neither modern nor American in its origin. Many people venerate one who commented on the publicans who collected the taxes in his time.

> And when the Pharisees saw it, they said unto his disciples, Why eateth your Master with publicans and sinners?
>
> But when Jesus heard that, he said unto them, They that be whole need not a physician, but they that are sick.
>
> ....I am not come to call the righteous, but sinners to repentance.
>
> Matthew 9:11-13

protest against the Stamp Act which helped set in motion the chain of events which won for this nation its independence from a repressive King George and led to the enshrining in the first amendment of the right to protest.

Since the trial court seemed justifiably confused as to the proper application of the first prong of the test, this case should be remanded to give the trial court an opportunity to reconsider the matter in light of this clarification of the various means by which selectivity may be proved. The possibility that the confusion may have affected the finding that selectivity was motivated by a desire to suppress outspokenness suggests that the trial court not be bound by that finding on remand but rather be permitted to reconsider whether both selectivity and illegal purpose were proved in this case.

I would therefore reverse and remand for reconsideration by the trial court.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Office of the Clerk
C404 United States Courthouse
Denver, Colorado 80294

HOWARD K. PHILLIPS
Clerk

March 9, 1982

Mr. Cecial A. Hartman
Suite 214
5660 S. Syracuse Circle
Englewood, CO 80111

Mr. Robert N. Miller
U.S. Attorney
Mr. Charles H. Torees, Asst.
1200 Federal Bldg.
Denver, CO 80294

RE: 80-1856, U.S.A. v. Amon
80-1859, U.S.A. v. Dunbar

Dear Counsel:

Enclosed is a copy of an order entered today in the captioned causes.

Very truly yours,
/s/
HOWARD K. PHILLIPS
Clerk

HKP:rp
Enclosure

MARCH TERM - March 9, 1982

Before Honorable William J. Holloway, Jr., Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges.

UNITED STATES OF AMERICA,	:	
		Nos.
Plaintiff-Appellee,	:	
		80-1856
v.	:	
		and
ALAN D. AMON and GARY W. DUNBAR,	:	
		80-1859
Defendants-Appellants.	:	

This matter comes on for consideration of appellants' petitions for rehearing filed in the captioned causes.

Upon consideration whereof, the petitions for rehearing are denied by order of Circuit Judges Holloway and Logan. Judge McKay voted to grant rehearing.

/s/
HOWARD K. PHILLIPS
Clerk

Opposition

Office-Supreme Court, U.S.
FILED
JUL 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2078

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALAN D. AMON AND GARY W. DUNBAR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2078

ALAN D. AMON AND GARY W. DUNBAR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of their separate convictions for furnishing false and fraudulent withholding information to their employers on the grounds that they were subject to improper selective prosecution and that the district courts erred in admitting into evidence the amount of wages they earned after they supplied that information to their employers.

Following separate non-jury trials in the United States District Court for the District of Colorado, petitioners were convicted of willfully supplying false withholding allowance certificates to their employers, in violation of 26

U.S.C. 7205. Petitioner Amon was sentenced to one year of imprisonment, to be followed by a two-year term of probation. Petitioner Dunbar was sentenced to one year of imprisonment (Pet. App. A2-A3 & nn. 2 & 3). The cases were consolidated on appeal and the court of appeals affirmed, with one judge concurring and one judge dissenting (Pet. App. A1-A52).

The pertinent facts may be summarized as follows: On February 22, 1979, Amon signed and filed his 1978 federal income tax return, indicating a tax liability of $1,621. The following day, however, he supplied his employer, Cherne Construction Company, with a W-4 form on which he claimed an exemption from federal income tax withholding, certifying that he incurred no tax liability for 1978 and expected none for 1979.[1] On June 15, 1979, Amon submitted another W-4 form to a different employer, Peabody Process Systems, on which he repeated these assertions, although he had been working on a steady basis since the beginning of the year. These two filings formed the bases for the charges of which Amon was convicted (Pet. App. A5-A6).

In January 1979, Dunbar supplied his employer, Ebasco Services, with a W-4 form claiming an exemption from federal income tax withholding. Dunbar was acquitted on the count which charged the filing of this form as a criminal violation. In February 1979, he signed and filed his 1978 federal income tax return, indicating a tax liability of $3,611. In July 1979, Dunbar and other Ebasco employees who were claiming an exemption from withholding received a form letter from the Internal Revenue Service outlining

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[1]The court of appeals here referred to the "W-4 Form" as the form on which these certifications were made. We note that such certifications are normally made on the "W-4E Form."

the requirements for claiming such an exemption. Nevertheless, when Dunbar filed a second W-4 form with Ebasco in August 1979, he again claimed an exemption and certified that he incurred no federal income tax liability for 1978 and anticipated none for 1979. The filing of the second W-4 form supplied the basis for the charge on which Dunbar was convicted (Pet. App. A6-A8).

1. Petitioners contend (Pet. 4-7) that they were the victims of improper selective prosecution because they exercised their First Amendment rights of free speech to protest the federal tax system. In order to establish a claim of improper selective prosecution, a defendant must show that others similarly situated generally have not been prosecuted, and that the government's prosection of him is impermissibly selective, invidious, in bad faith or based on impermissible considerations such as race, religion or his exercise of constitutional rights. *United States* v. *Wilson*, 639 F. 2d 500, 503 (9th Cir. 1981); *United States* v. *Kahl*, 583 F. 2d 1351, 1353-1354 (5th Cir. 1978); *United States* v. *Berrios*, 501 F. 2d 1207, 1211 (2d Cir. 1974). The district courts here concluded that petitioners were not the victims of impermissible selective prosecution, and the court of appeals properly sustained those determinations on the ground that petitioners had not carried their burdens of proof.

To support their argument, petitioners cite (Pet. 5) the statement of the trial judge in Amon's case that he found no improper selective prosecution even though Amon was selected for prosecution "because he is an active and outspoken protestor" (II Supp. R. 32).[2] They further quote (Pet. 5-6) the reference by the dissenting judge in the court of appeals to exhibits presented in both cases, namely, a

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[2]"II Supp. R." refers to the transcript of the August 7, 1980, district court proceedings in Amon's case.

letter from the Internal Revenue Service to a protestor stating that he was selected for prosecution, in part, "because of * * * [his] past publicized activities in the illegal tax protest movement," and an Internal Revenue Manual Supplement containing instructions to proceed against "protestors" (A37-A38). But, as the majority opinion of the court of appeals correctly recognized (Pet. App. A17-A18), such facts alone are insufficient to sustain a claim of impermissible selective prosecution.

The decisions of the other courts of appeals which have considered the question are in accord. It has consistently been held that such a showing merely establishes that there has been some selectivity in enforcement, but does not establish that such selection is impermissible.[3] Accordingly,

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[3]See, *e.g.*, *United States* v. *Stout*, 601 F. 2d 325, 328 (7th Cir.), cert. denied, 444 U.S. 979 (1979) (defendant established that he was an active "tax protestor"); *United States* v. *Catlett*, 584 F. 2d 864, 866-867 (8th Cir. 1978) (defendant introduced into evidence a copy of an Internal Revenue Manual which directed a selective approach as the most effective means of deterring the widespread use of tax noncompliance as a means of protest); *United States* v. *Kahl*, *supra*, 583 F. 2d at 1353-1354 (parties stipulated that the government had a policy of selectively prosecuting tax protestors); *United States* v. *Scott*, 521 F. 2d 1188, 1195 (9th Cir. 1975), cert. denied, 424 U.S. 955 (1976) (defendant demonstrated that the government had an announced policy of vigorous enforcement of tax laws against those who took a public stand against filing tax returns). These cases and others recognize that prosecution of persons who publicly announce their violation of the law as a form of protest against the taxing system may merely reflect that such activities have naturally attracted the attention sought (*United States* v. *Wilson*, *supra*, 639 F. 2d at 505; *United States* v. *Stout*, *supra*, 601 F. 2d at 328; *United States* v. *Kahl*, *supra*, 583 F. 2d at 1354 n.2); that such cases present the strongest occasion for prosecution where willful misconduct is an element of the offense (*United States* v. *Wilson*, *supra*, 639 F. 2d at 505; *United States* v. *Scott*, *supra*, 521 F. 2d at 1195); or that such cases have been selected for prosecution because of their potential for achieving the permissible purpose of deterring other similar violations (*United States* v. *Catlett*, *supra*, 584 F. 2d at 867-868; *United States* v. *Gillings*, 568 F. 2d 1307, 1309 (9th Cir.), cert. denied, 436 U.S. 919 (1978)).

in order to establish that the prosecution is based upon the improper motive of silencing dissent rather than upon a legitimate consideration, the courts, without exception, have required defendants advancing claims similar to those presented by petitioners here to establish that others who have committed identical criminal violations but who have not taken a vocal stand on the issue have not generally been prosecuted. See, *e.g.*, *United States* v. *Wilson, supra*, 639 F. 2d at 504; *United States* v. *Kahl, supra*, 583 F. 2d at 1353; *United States* v. *Scott*, 521 F. 2d 1188, 1195 (9th Cir. 1975), cert. denied, 424 U.S. 955 (1976). The court of appeals concluded that the petitioners did not make this showing, and they do not contend otherwise in their petition. They have accordingly failed to establish their claim of selective prosecution.

2. Petitioners further argue (Pet. 9) that the district courts erred in admitting evidence as to the amount of wages they earned in 1979 after they filed their W-4 forms. When petitioners claimed their exemptions from federal income tax withholding, they certified that they had no tax liabilities for 1978 and expected no tax liabilities for 1979. Evidence concerning the amount of wages earned after the submission of the W-4 forms, therefore, was relevant within the meaning of Fed. R. Evid. 401, since it tended to establish a motive for falsely claiming the exemptions from the withholding requirements. That evidence also tended to rebut petitioners' claims that they could not reasonably anticipate tax liability for 1979. For example, Amon had been working on a steady basis for six months when he filed his second W-4 form in June of 1979.

At all events, even on the assumption that the trial court erred in admitting such evidence, the error would have been harmless under Rule 52, Fed. R. Crim. P., since other evidence showed that, contrary to certifications in their W-4 forms, petitioners incurred tax liabilities for 1978.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JULY 1982

DOJ-1982-07